In the Court of Appeal of Alberta

Citation: R. v. Smalley, 2006 ABCA 310

Date: 20061020
Docket: 0603-0196-A
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent (Defendant)

- and -

James Robert Smalley

Appellant/Applicant
(Plaintiff)

Reasons for Decision of
The Honourable Mr. Justice Keith Ritter

Application for Judicial Interim Release

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[1] James Robert Smalley ("Smalley") appeals from his conviction and sentence on a charge of unlawful confinement, and seeks bail pending appeal pursuant to s.679 of the ***Criminal Code***, R.S.C. 1985, c. C-46. Smalley must establish:

1. His appeal is not frivolous.

2. He will surrender himself into custody accordance with the terms of the bail order.

3. His detention is not necessary in the public interest.

[2] The Crown argues that Smalley has not shown any of the three requirements. It submits that (1) Smalley's appeal is frivolous and enjoys little chance of success; (2) Smalley's past record indicates that he is unlikely to surrender himself into custody in accordance with the provisions of any bail order; and (3) that Smalley's profile suggests he is an abusive womanizer who is likely to re-offend and it is in the public interest not to permit his release.

[3] Smalley's affidavit and attached materials seemingly advance several grounds of appeal. First, he appears to raise a competence of counsel argument, and states that his counsel advised against Smalley testifying or calling other witnesses. Smalley now wants to testify and call other witnesses. In so doing, Smalley hopes to demonstrate that the complainant suffers from bipolar disorder and was not taking her medications at the time of the offence, that the sentence was influenced by false information contained in his psychological assessment, and that the facts do not support the confinement charge. Smalley also argues that the Crown's case was tainted by the false belief on the part of police and prosecutors that Smalley obtained the complainant's room number through a ruse. Finally, Smalley argues that the law does not allow one to be confined absent force, threats or weapons, and that none of these elements were proven by the Crown at trial.

[4] For the reasons given below, Smalley's purported grounds of appeal do not clear the "beyond frivolous" hurdle, and his application for bail is denied.

[5] Smalley seems to be of the view that his argument regarding additional evidence can be made without alleging incompetence of trial counsel. He is technically correct but only if he advances the evidence as fresh evidence on appeal. In order to do so, Smalley must, at a minimum, demonstrate that the proposed evidence was not available to him at trial. There is nothing in the record before me to support this contention. Smalley was obviously available to testify at trial on his own behalf and chose not to. Further, his materials on this application do not disclose whether the other proposed witnesses were available to be called at the trial.

[6] Another precondition to receipt of fresh evidence on appeal is that the proposed evidence must be highly determinative of the outcome. Smalley's proposed evidence relates to the complainant's behaviour at the time of the incident and her purported failure to take her medications, along with the fact that she initiated contact between herself and Smalley after the events occurred. Assuming this evidence was adduced and accepted by a trier of fact, it is unlikely to have affected the outcome of the trial.

[7] Smalley also says that had he testified, he would have established that a telephone line in the hotel room in which the victim was confined was not torn out by him but rather pulled out when he accidentally tripped over it. He also suggests that the complainant confirmed that the phone line could have been accidentally torn out, and argues that both these factors show that his appeal has merit. However, the trial judge did not refer to the broken telephone line in his decision, and it does not appear to have influenced his analysis. This line of argument also enjoys little prospect of success. Consequently, Smalley's proposed evidence is unlikely to be accepted as fresh evidence on appeal.

[8] If Smalley is alleging incompetence of counsel, he faces other hurdles. Establishing incompetence of counsel is not easy. Tactical decisions that, in retrospect, are regretted will rarely, if ever, lead to a new trial based on counsel's incompetence. In any event, there is no apparent incompetence of trial counsel in this instance. Smalley's record, which reveals several convictions on spousal abuse charges, is such that any trial counsel might legitimately recommend against his testifying. Further, much of the proposed evidence is designed to refute the complainant's evidence on collateral matters. Counsel cannot be faulted for not calling inadmissible evidence.

[9] I conclude that Smalley enjoys little prospect of success with respect to either a fresh evidence application or an incompetence of counsel argument.

[10] Smalley also argues that the entire case against him was based on the police's belief that he posed as a pizza delivery person to ascertain the complainant's hotel room. The evidence before the trial judge showed that the complainant intended to end her relationship with Smalley and left their home to hide out at a local hotel. The complainant instructed hotel personnel not to let anyone know she was staying at the hotel and not to give out her room number. On the night in question, the night clerk received a call from someone alleging to have a pizza for delivery to the complainant. The clerk provided the complainant's room number to the caller. Shortly after the call to the clerk, Smalley appeared at the complainant's hotel room. The complainant testified that Smalley ascertained her location by approaching various hotels in the area and pretending to be a pizza delivery person.

[11] In light of this evidence, any inference drawn by the trial judge that Smalley used this ruse to obtain the complainant's room number would not be easily set aside, given the high standard of review relating to findings of fact and factual inferences. In any event, the trial judge made no reference to this evidence in his decision. This ground also enjoys little prospect of success.

[12] The evidence that was relied upon by the trial judge relates to the complainant's belief that she had no choice but to remain in the room with Smalley in the circumstances, and was supported by the past history between Smalley and the complainant involving previous charges of assault. Smalley argues that his conviction cannot stand in the absence of threats, force or weapons. Forcible confinement is a general intent offence and only requires minimal intent to effect deprivation of freedom of movement: ***R. v. S.J.B.***, 2002 ABCA 143, 312 A.R. 313 at para. 41. Proof as to total physical restraint or confinement during the entire period at issue is not required: ***R. v. Gratton***, [1985] O.J. No. 36, 18 C.C.C. (3d) 462 at 473 (Ont. C.A.), leave to appeal to S.C.C. refused, [1985] 1 S.C.R. viii. Smalley enjoys minimal prospect of success with respect to this ground of appeal.

[13] Having concluded that all the grounds advanced by Smalley do not exceed the standard of being more than frivolous grounds of appeal, Smalley's application for bail must fail. I need not consider whether Smalley is able to establish that he is not a flight risk or whether it is in the public interest that he be detained.

[14] I note Smalley's expressed intention to obtain counsel for appeal purposes through legal aid. Because Smalley represented himself and may not have perfected his materials in order to establish a more than frivolous ground of appeal, Smalley is granted leave to reapply for bail once he has obtained counsel.

[15] The application is dismissed.

Application heard on October 18, 2006

Reasons filed at Edmonton, Alberta
this 20th day of October, 2006

Ritter J.A.

Appearances:

J.C. Robb, Q.C.
For the Respondent (Defendant)

James Robert Smalley
The Appellant/Applicant (Plaintiff) in Person